FILED
SEP 8 1980
MICHAEL RODAK, JR., CLERK

No. 79-408.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1979.

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
PETITIONERS,

v.

PEOPLE OF THE STATE OF ILLINOIS, AND PEOPLE OF THE STATE OF MICHIGAN,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief of Amicus Curiae, New England Legal Foundation, in Support of Respondents.

WILLIAM W. BECKER,
LANDFIELD, BECKER & GREEN,
Suite 1050,
1819 H Street, N.W.,
Washington, D.C. 20006.
(202) 293-1919

WAYNE S. HENDERSON,
ROBERT R. RUDDOCK,
New England Legal Foundation,
110 Tremont Street,
Boston, Massachusetts 02108.
(617) 482-1410

ADDISON C. GETCHELL & SON, INC. · THE LAWYERS' PRINTER · BOSTON

Table of Contents.

Interest of Amicus Curiae 1

Summary of Argument 3

Argument 5

I. The Federal Common Law Provides a Federal Judicial Definition and Vindication of Rights in Matters of Federal Concern Or Relationship 5

A. The Federal Common Law Is Available to Ensure the Rights of a State to the Exercise of Its Police Powers, and to the Control of Its Own Ecological Destiny, Against Impairment from Outside Sources 6

B. The Federal Common Law Is Available to Articulate the Federal Interest in Maintaining the Purity of the Nation's Air and Waters 10

II. The Federal Common Law Applicable in the Instant Case Was Not Preempted by the Federal Water Pollution Control Act 13

A. Federal Statutes Are Not To Be Construed as Preempting the Federal Common Law Or the State Rights Vindicated Thereby Absent a Clear Expression of Preemptive Intent 13

B. The Federal Water Pollution Control Act Displays a Clear Congressional Intent to Preempt Neither the State Police Power nor the Federal Common Law 15

C. Where States Have an Express Statutory Right to Set Varying Pollution Control Standards, Only a Federal Common Law Means of Resolving an Unreasonable Interstate Interference with Those Standards Can Prevent the Likelihood of Interstate Industrial Competition at the Expense of Environmental Quality 21

III. Subsequent Judicial Interpretations of the Rule of *Illinois* Have Seen Some Variation Which Warrants Clarification by This Court 23

Conclusion 29

Table of Authorities Cited.

CASES.

Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973), reh. denied, 412 U.S. 933 (1973) 14

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 12

Byram River v. Village of Port Chester, 7 E.R.C. 1127 (D. Conn. 1974), 394 F. Supp. 618 (S.D. N.Y. 1975) 27n.

California Tahoe Regional Planning Agency v. Jennings, 594 F. 2d 181 (9th Cir. 1979) 24n.

City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F. 2d 1008 (7th Cir. 1979), cert. denied, — U.S. —, 48 U.S.L.W. 3436 (January 8, 1980) 17n., 24n., 25

Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) 11

Committee for the Consideration of the Jones Falls Sewage System v. Train, 539 F. 2d 1006 (4th Cir. 1976) 25, 27, 28

Commonwealth of Massachusetts v. United States Veterans Administration, 541 F. 2d 119 (1st Cir. 1976) 26

Connecticut v. Levi Strauss & Co., 471 F. Supp. 363 (D. Conn. 1979) 14

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 5, 9

Georgia v. Tennessee Copper Company, 206 U.S. 230 (1907) 8, 9, 10, 12

Getty Oil Co. v. Ruckelshaus, 467 F. 2d 349 (3d Cir. 1972) 17n.

Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976) 13

Hinderlider v. La Plata River and Cherry Creek Ditch Company, 304 U.S. 92 (1938) 9, 12, 25n.

Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) 13, 14n.

Illinois v. Milwaukee, 406 U.S. 91 (1972) 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18n., 19, 23, 26

Illinois v. Milwaukee, 4 E.R.C. 1849 (N.D. Ill. 1972) 3n., 4

Illinois v. Milwaukee, 599 F. 2d 151 (7th Cir. 1979) 3n., 4, 24, 25

Illinois v. Outboard Marine Corporation, — F. 2d —, 14 E.R.C. 1281 (7th Cir. 1980) 26, 28

In Re Debs, 158 U.S. 564 (1895) 10, 12

Isbrandtsen Co. v. Johnson, 343 U.S. 779 (1952) 15

Michie v. Great Lakes Steel Division, 495 F. 2d 213 (6th Cir. 1974), cert. denied, 419 U.S. 997 (1974) 27n.

Minnesota v. Reserve Mining Co., 419 U.S. 802 (1974) 11, 12

Missouri v. Illinois, 180 U.S. 208 (1901) 7, 8, 10

National Sea Clammers Association v. City of New York, 616 F. 2d 1222 (3d Cir. 1980), petition for cert. filed, 48 U.S.L.W. 3752 (May 20, 1980) 17n., 24n., 25n., 26-27

New England Legal Foundation v. Costle, 475 F. Supp. 425 (D. Conn. 1978), aff'd in part, reserved in part, — F. 2d — (2d Cir. May 20, 1980) 2, 21, 27

New Jersey v. New York, 283 U.S. 336 (1931) 12

N.R.D.C. v. Train, 510 F. 2d 692 (D.C. Cir. 1975) 17

Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971) 8

Parsell v. Shell Oil Company, 421 F. Supp. 1275 (D. Conn. 1976), aff'd sub nom. East End Yacht Club v. Shell Oil Co., 573 F. 2d 1289 (2d Cir. 1977) 25

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 15

Reserve Mining Co. v. Environmental Protection Agency, 514 F. 2d 492 (8th Cir. 1975) 25-26

Sierra Club v. Morton, 405 U.S. 727 (1972) 16, 17n.

State of Texas v. Pankey, 441 F. 2d 236 (10th Cir. 1971) 6, 9, 10, 12, 23

Stream Pollution Control Board of Indiana v. U.S. Steel Corp., 512 F. 2d 1036 (7th Cir. 1975) 23, 24

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 11

Township of Long Beach v. City of New York, 445 F. Supp. 1203 (D. N.J. 1978) 24n., 25n.

United States v. Ira S. Bushey & Sons, Inc., 346 F. Supp. 145 (D. Vt. 1972), and 363 F. Supp. 110 (D. Vt. 1973) 24n.

United States v. Stoeco Homes, Inc., 498 F. 2d 597 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975) 24

Washington v. General Motors Corp., 406 U.S. 109 (1972) 17, 18n.

CONSTITUTIONAL PROVISIONS.

United States Constitution:

Article I, § 8 5, 11

Article III 5, 7

Article VI, cl. 2 13n.

STATUTES.

Clean Air Act Amendments of 1970, 42 U.S.C. § 1857, 42 U.S.C. § 1857h-2(e); recodified to 42 U.S.C. § 7604(e) 14n., 17, 27

Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1251, et seq. 4, 5, 11, 13, 14, 15, 17n., 18, 19, 20, 21, 24, 26, 27, 29

Section 101(a), 33 U.S.C. § 1251(a) 20

Section 101(b), 33 U.S.C. § 1251(b) 14n., 20

Section 101(e), 33 U.S.C. § 1251(e) 16n.

Title II, 33 U.S.C. Subchapter II 20n.

Section 301, 33 U.S.C. § 1311 20n.

Section 303, 33 U.S.C. § 1313 20n.

Section 304, 33 U.S.C. § 1314 20n.

Section 306, 33 U.S.C. § 1316 20n.

Section 307, 33 U.S.C. § 1317 20n.

Section 309, 33 U.S.C. § 1319 20n.

Section 312(f), 33 U.S.C. § 1322(f) 15

Section 505, 33 U.S.C. § 1365 16, 20n.

Section 505(e), 33 U.S.C. § 1365(e) 4, 16, 17, 18, 20, 28

Section 510, 33 U.S.C. § 1370 4, 18

Section 511(a), 33 U.S.C. § 1371(a) 4, 19

Federal Water Quality Control Act of 1970, 33 U.S.C. §§ 1151 et seq. 14

National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321, et seq. 13, 20, 26

LEGISLATIVE PROVISIONS AND HISTORY.

S. 2770, 92d Cong., 1st Sess. 16n.

H.R. 11896, 92d Cong., 2d Sess. 16n.

S. Rep. No. 92-414, 92d Cong., 1st Sess. (October 28, 1971) 16

H. Rep. No. 92-911, 92d Cong., 2d Sess. (March 11, 1972) 16, 19

S. Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. (September 28, 1972) 16, 19

"A Legislative History of the Water Pollution Control Act Amendments of 1972," Environmental Policy Division of the Congressional Research Service of the Library of Congress, 93d Cong., 1st Sess. (January, 1973) 16, 18n., 21

OTHER AUTHORITIES.

Note, Federal Common Law and Interstate Pollution, 85 Harv. L.Rev. 1439 (1972) 6n.

The Federalist No. 80 (A. Hamilton) (Dawson ed. 1863) 7

Woods and Reed, The Supreme Court and Interstate Environmental Quality: Some Notes on the Wyandotte Case, 12 Ariz. L.Rev. 691 (1970) 7n.

No. 79-408.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1979.

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
PETITIONERS,

v.

PEOPLE OF THE STATE OF ILLINOIS, AND PEOPLE OF THE STATE OF MICHIGAN,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief of Amicus Curiae, New England Legal Foundation, in Support of Respondents.

Interest of Amicus Curiae.

New England Legal Foundation (NELF) is a non-profit, tax-exempt corporation, organized and existing under the laws of the Commonwealth of Massachusetts for the purpose of representing the public interest of the people of the six New England states in judicial or administrative proceedings which affect the economy and environment of New England. Policy for NELF is established by a Board of Directors composed of citizens, a majority of whom are attorneys, from each of the New England states.

NELF has long been interested in the proper accommodation of both public and private interests in the maintenance of a healthful environment and the stimulation of a sound economy. The purchase of industrial development at the expense of environmental protection provokes a need for a determination of the appropriate balance between the competing interests, and the equitable apportionment of the costs of the solution chosen. In an effort to help define that proper and equitable balance, NELF has actively participated in numerous administrative and judicial proceedings treating these issues.

NELF is also the primary party plaintiff in *New England Legal Foundation v. Costle,* 475 F. Supp. 425 (D.Conn. 1978), *aff'd in part, reserved in part,* — F. 2d — (2d Cir. May 20, 1980). That case involves allegations of harmful interstate air pollution, and one cause of action under the federal common law of nuisance closely analogous to the case at bar has been reserved for further briefing and judgment by the Second Circuit Court of Appeals, pending the decision of this Court in the instant case. This Court's ruling, therefore, is likely to have a direct bearing upon the outcome of *New England Legal Foundation v. Costle,* and upon the rights of NELF and its co-plaintiffs in that litigation.[1]

NELF believes that federal pollution control statutes dealing with both air and water emissions were intended by Congress only to provide a uniform minimum level of pollution control throughout the fifty states, but without infringement of the common law right of each state or municipality to control activities affecting its air, land, or waters, insofar as the exercise of such right shall not interfere with the federally

---

[1] The named plaintiffs in that case include NELF, Connecticut Business and Industry Association, Connecticut Conference of Municipalities, 31 separately named Connecticut municipalities, and 3 individual citizens of the state.

mandated minimum level of control. That right is rooted in the basic tenets of our federalist system and the fundamental doctrines of property use.

New England Legal Foundation supports the decision of the Seventh Circuit Court of Appeals in the case at bar, and respectfully urges its affirmance.

Summary of Argument.

When *Illinois v. Milwaukee,* 406 U.S. 91 (1972) ("*Illinois*")[2] found federal question jurisdiction in the conflict between Illinois' assertion of its environmental and public health interests and the land use and municipal finance considerations inherent in Milwaukee's system of sewage treatment and disposal, it did so on two grounds. The Court found a federal interest in the intergovernmental nature of the conflict, as well as in the national environmental interest expressed in various federal environmental legislation.

NELF contends that neither facet of the common law right recognized by this Court in *Illinois* has been preempted or otherwise limited by subsequent statutory amendment or federal regulation, except insofar as such enactments may offer guidance in the creation of a remedy consistent with federal policy. NELF does not believe that the remedy prescribed by the District Court and modified by the Circuit Court is inconsistent with the expressed federal policies of protecting the public health and the national environment, and of preserving the rights of states to set water quality standards more stringent than the uniform federal minimum

---

[2] Prior decisions in the instant litigation will be referred to as follows: *Illinois v. Milwaukee,* 406 U.S. 91 (1972), as "*Illinois*"; *Illinois v. Milwaukee,* 4 E.R.C. 1849 (N.D. Ill. 1972), dealing with questions of jurisdiction and venue, as "*Illinois II*"; and *Illinois v. Milwaukee,* 599 F. 2d 151 (7th Cir. 1979), the decision presently before this Court on review, as "*Illinois III*".

standards. NELF supports the arguments on personal jurisdiction and venue advanced by the Respondents herein, and espoused by the Courts in *Illinois II,* 4 E.R.C. at 1850, and *Illinois III,* 599 F. 2d at 155-57, but will not present further argument on these issues. NELF takes no position on the evidentiary support for the factual finding of nuisance, nor on the propriety or adequacy of the equitable relief granted.

In enacting the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251, *et seq.,* Congress intended to continue the system of cooperative federalism previously relied upon to control pollution of interstate and navigable waters, while increasing the federal demands upon and inducements to the states more actively to assume their front-line role in the process. It was made amply clear throughout the Act, and particularly in §§ 505(e), 510 and 511, that neither aspect of the federal common law recognized in *Illinois*—neither the federal concern nor the federal relationship implicated by the allegations of pollution of navigable waters—was intended to be preempted by the statute.

Several aspects of the federal common law of nuisance set forth in *Illinois* remain subject to some uncertainty and disagreement in the courts. Whether the presence of interstate effects must be alleged, or whether pollution of navigable waters or ambient air is sufficient—whether suit must be instituted by a state, or whether it is available to a municipality or a private party—whether the interests of a state must be implicated in such a suit, or whether the national environmental interest may be invoked by a private party—all are questions whose answers may not be essential to a closely drafted decision in the case at bar. NELF, however, respectfully submits that the Court's decision in this case presents an opportunity to amplify the reasoning of *Illinois,* and to offer guidance to the Circuits on these issues of differing interpretation.

Argument.

I. The Federal Common Law Provides a Federal Judicial Definition and Vindication of Rights in Matters of Federal Concern or Relationship.

Consideration of the effect of a statutory scheme upon a predecessor common law right and remedy suggests an understanding of the nature of the preexistent right and the purpose and authority of the subsequent statute. NELF submits that analysis of both the common law right asserted by this Court in *Illinois* and the Federal Water Pollution Control Act compels the conclusion that the cause of action expressed by *Illinois* was not preempted or otherwise restricted by the statute.

Far from promulgating a federal common law of nuisance for ambient or interstate pollution, the opinion of Mr. Justice Douglas in *Illinois* recognized that the controversy alleged fell among those specialized areas in which the federal common law survived the general limitation of *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938). *Illinois* found justification for the exercise of the federal judicial lawmaking power in the presence of "matters of federal concern ['where there is an overriding federal interest in the need for a uniform rule of decision,' at 105 n.6] and relationship" ['or where the controversy touches basic interests of federalism,' *id.*]. 406 U.S. at 99. The issues of "federal concern" are derived from statutory expressions of federal interest in pollution, the environment, and the nation's interstate and navigable waters, and ultimately rely upon the delegation of power contained in the Commerce Clause, Article I, § 8, of the Constitution. The "basic interests of federalism" recognized in *Illinois,* however, are not expressly stated in the Constitution, but are implicit throughout and lie at the very roots of Article III.

They are descendant of the quasi-sovereign powers reserved by the states, and the necessary provision of a peaceful means for the ordering of those powers required by the creation of a union between the states.

The *Illinois* court not only reaffirmed the existence and authority of the federal law to resolve conflicting exercises of the state police power, but properly broadened the scope of that area of federal concern to accommodate the national interest in the maintenance of environmental quality, an interest which has found increasing expression in the federal environmental statutes of the past decade.

A. *The Federal Common Law Is Available to Ensure the Rights of a State to the Exercise of Its Police Powers, and to the Control of Its Own Ecological Destiny, Against Impairment from Outside Sources.*

The "controlling principle" cited by Mr. Justice Douglas in *Illinois*—that the federal judicial lawmaking power applies to "matters of federal concern and relationship"—was taken from *State of Texas v. Pankey,* 441 F. 2d 236, 240 (10th Cir. 1971). The matter of "federal concern and relationship" which *Pankey* found to be at the root of the Texas-New Mexico caterpillar war was the improper impairment of the natural resources and environment of a state by acts done outside its boundaries. The Court there relied upon the federalist notion—*federalist* in that it concerns the structure of the federation and the ordering of the interrelations of its constituent members, rather than *federal* in the sense of concerning the delegated central governmental powers[3]—that each state retains a quasi-sovereign right in the conditions of its land, water and air. When the exercise of that right may collide with the exercise of a similar right by another state,

[3] Note, *Federal Common Law and Interstate Pollution,* 85 Harv. L.Rev. 1439, 1444 (1972).

the very nature of the federalist system, even in the absence of any specific Constitutional delegation of authority, demands that the courts of the central government determine the proper and peaceful resolution of the conflict. It is as much the nature of the party as the right asserted which by this analysis evokes the demand.

The *federalist* underpinning for the exercise of the federal common law in interstate pollution disputes evolved from the jurisdiction of the federal courts over questions of state sovereignty inherent in boundary disputes. *Missouri v. Illinois,* 180 U.S. 208 (1901). The Constitutional provision relied upon in these cases was the Article III grant of exclusive Supreme Court jurisdiction in suits involving states, and the rationale for federal equity jurisdiction was offered in *The Federalist No. 80*:

> Whatever practices may have a tendency to disturb the harmony between the States, are proper objects of Federal superintendence and control.
>
> . . . And if it be a just principle that every Government *ought to possess the means of executing its own provisions, by its own authority,* it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the National Judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal, which having no local attachments will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded. (Emphasis in original.)[4]

---

[4] *The Federalist No. 80* (A. Hamilton) at 555 (Dawson ed. 1863); *and see,* Woods and Reed, *The Supreme Court and Interstate Environmental Quality: Some Notes on the Wyandotte Case,* 12 Ariz. L.Rev. 691, 700-01 (1970).

It was more than mere impartiality of the forum which the framers found to require federal jurisdiction. It was the need to provide for the peaceful ordering of relations between the states, and to protect the right of each to assert authority over its own domain, by providing for a federal rule of law to accommodate both conflicting rights, that was at the heart of these early interstate disputes.

The right itself, while variously phrased, was felt to adhere to the state, and the ultimate justification for the exercise of the federal lawmaking power was as the federalist alternative to armed conflict. In *Missouri* it was the state's derivative right, as *parens patriae,* to protect the public health of its citizens which provided grounds for federal equity jurisdiction. The state was considered the proper party to assert the collective rights of its populace to health and comfort, as well as of its communities to prosperity. *Id.* at 241; *see also, Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 505-06 (1971) (Douglas, J., dissenting).

And where the natural resources of the state are threatened by harmful extraterritorial conduct, the state's quasi-sovereign power to determine the utilization of those resources has also been recognized. In *Georgia v. Tennessee Copper Company,* 206 U.S. 230 (1907), the leading early case of interstate air pollution, Mr. Justice Holmes articulated the right of a state to the control of its ecological destiny.

> In that [quasi-sovereign] capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. 206 U.S. at 237.

Although *Tennessee Copper* first expressed this ecological interest, the source of the right to protection of that interest in the federal courts was there only suggested as being federal in nature, from the federalist concept of a peaceable union

making forcible abatement impossible. The union did not, it was held, imply that such quasi-sovereign interests were forsaken, only that they must be determined by federal courts. *Id.* at 237.

The state, however, is not the only party competent to assert rights which, from this *federalist* perspective, call for resolution by the federal judiciary. *Hinderlider v. La Plata River & Cherry Creek Ditch Company,* 304 U.S. 92 (1938), issued on the same day that *Erie* restricted the federal common law in typical diversity cases, and also authored by Mr. Justice Brandeis, carefully preserved the federal common law in cases requiring not only an impartial forum, but an impartial rule of law, as well. The quasi-sovereign rights of a state demand protection by a federal rule of law, and where those rights are implicated even by a private party plaintiff, a federal common law will be applied. 304 U.S. at 110.

While the implication in *Tennessee Copper* was strong, it was not until *Pankey* that the ecological right was clearly recognized as having a federal source. Based upon the reasoning of *Tennessee Copper* and the subsequent caselaw, the *Pankey* court held that the ecological right of a state against improper impairment from outside sources is a matter of federal concern or relationship, and therefore provokes application of a federal common law. 441 F. 2d at 240.

It was this *federalist* aspect of the federal interest which necessarily lay at the heart of *Illinois,* as in truth that was the case directly presented to the Court by the allegations. An asserted state right—as *parens patriae* to protect the public health, or as quasi-sovereign over the control of its own environment—was being impaired by conduct having interstate consequences. *Illinois* held that a conflict over rights in interstate streams, just as does any dispute implicating the question of apportionment of interstate waters or the setting of interstate boundaries, presents *federalist* issues requiring

resolution by the application of the federal common law. *Id.* at 105. But *Illinois* looked beyond that *federalist* interest, and found a *federal* interest justifying application of the federal common law, as well.

B. *The Federal Common Law Is Available to Articulate the Federal Interest in Maintaining the Purity of the Nation's Air and Waters.*

While recognizing that a federal common law has been applied to matters of federal concern or relationship, *Pankey* relied exclusively upon *Tennessee Copper* as the expression of the applicable right, and thereby seemed to pin its holding primarily to the existence of a federal relationship. There is no discussion of the independent national environmental interest evinced by federal statutes in the area, and it is not until Mr. Justice Douglas' decision in *Illinois* that environmental protection is considered a matter of federal concern, as well as relationship.

The federal interest in the maintenance of the purity of the nation's air and waters was anticipated in *Missouri v. Illinois* in its reference to *In Re Debs,* 158 U.S. 564, 586 (1895), in which the Court held the federal equity jurisdiction available to abate a public nuisance,

> "whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the nation, and concerning which the nation owes its duty to all the citizens of securing to them their common rights. . . ." 180 U.S. at 236.

Debs found the existence of a nuisance in the interference with federal interests expressed in statute, for it is only to the extent that federal policy regarding the delegated powers of the central government may be found in federal statutory expression that they may be asserted. That is not, however, to

say that federal statute contains the only means of effectuating the federal policy expressed therein.

In *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943), the Court referred to the federal rather than state common law to determine the rights of the United States in matters affecting payments made by government checks. When the government exercises a Constitutional power, its rights must be determined by a federal common law gleaned from the general duties and rights described in the applicable statutes and regulations. *Id.* at 366. *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957), stated the principle even more clearly. In determining the source of the substantive law to be applied in cases of federal common law rights, Mr. Justice Douglas concluded that the courts must look to the general policies of the applicable federal laws, and fashion inventive remedies which best effectuate those policies. *Id.* at 456-57.

The progression was continued in *Illinois* and applied to the federal interest evidenced in recently enacted environmental legislation. Federal control over the nation's navigable waters, justified by the Commerce Clause, supports statutory assertion of the federal interest in the purity of the nation's waters. The statutes, however, again do not offer the exclusive means of effectuating federal policy. Nor is the federal policy expressed in the Federal Water Pollution Control Act its exclusive expression, as different aspects of federal concern may (as in the instant case) result in differing policy statements. The courts must look to the varying federal interests in the quality of navigable waters, and create from them an application of federal law which best effectuates those interests. *Id.* at 101-08.

The nature of the federal environmental interest itself was best expressed by Mr. Justice Douglas in *Minnesota v. Reserve Mining Co.,* 419 U.S. 802, 804 (1974), in his dissent on applications for temporary relief. Echoing the theme of

Debs that the national government has a responsibility to the people—"the sovereign power in this Nation"—to secure to them their common rights, he recognized the truly national interest in the quality of this nation's waters.

> I am not aware of a constitutional principle that allows either private or public enterprises to despoil any part of the domain that belongs to all of the people. Our guiding principle should be Mr. Justice Holmes' dictum that our waterways, great and small, are treasures, not garbage dumps or cesspools. *Id.* (footnote omitted, citing *New Jersey v. New York,* 283 U.S. 336, 342 (1931)).

This Court's decision in *Illinois* represents the confluence of several streams of legal precedent: the recognition of the ecological rights of a state (*Tennessee Copper* and *Pankey*); the survival of the federal common lawmaking power for the determination of rights in interstate waters (*Hinderlider*); and the application of federal, rather than state, judicial lawmaking authority in matters presenting federal interests as reflected by statute, or in matters considered "intrinsically federal" because of their need for a uniform rule of decision, or because they touch upon basic interests of federalism (*Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 425-27 (1964)). *Illinois,* 406 U.S. at 104-05.

The federal interest in interstate pollution disputes recognized in *Illinois* is twofold. The *federalist* component, based upon the retention of certain quasi-sovereign rights by the states, calls for the application of federal law peacefully to resolve conflicts in the exercise of those rights. The *federal* component, based upon the delegated authority of the central government to control matters affecting interstate commerce, requires the application of federal common law to accomplish the purposes of federal statutes and regulations concerning navigable waters. In the case at bar, both components are present, and both were properly contemplated in the exercise of the District Court's equity jurisdiction.

II. The Federal Common Law Applicable in the Instant Case Was Not Preempted by the Federal Water Pollution Control Act.

The Federal Water Pollution Control Act, 33 U.S.C. §§ 1251, *et seq.* (FWPCA), is not intended to be the exclusive pronouncement of policy regarding the nation's navigable waters. Congress not only specifically declined to foreclose a state's exercise of control over its own navigable waters, insofar as such exercise may not conflict with the federal scheme, but it also provided its own broader statement of federal environmental principles in the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.* (NEPA). Various other federal laws provide expressions of the national interest in the protection of fish and wildlife resources. *See, Illinois,* 406 U.S. at 102. Absent Congressional statement of supersession by the FWPCA, that statute must be interpreted together with other statutory expressions of federal interest in the navigable waters in order to discover the federal policy applicable to the instant case.

A. *Federal Statutes Are Not To Be Construed as Preempting the Federal Common Law Or the State Rights Vindicated Thereby Absent a Clear Expression of Preemptive Intent.*

It is, of course, axiomatic that the Supremacy Clause[5] empowers Congress to preempt state action in an area of federal concern. But it is also plainly given that the states retain broad power to legislate protection for their citizens in matters of local concern, such as public health. *Great Atlantic & Pacific Tea Co. v. Cottrell,* 424 U.S. 366, 371 (1976).

That state action which is designed to control pollution is a valid exercise of the police power to protect the public health was acknowledged in *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440, 442 (1960):

---

[5] U.S. Const. art. VI, cl.2.

> The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government.

The Court further intimated that the federal air pollution control act then in effect provided for just such concurrent action in this area of primarily state and local concern.[6]

Such a system of cooperative federalism was also found to be at the heart of the Water Quality Control Act of 1970, 33 U.S.C. §§ 1151, *et seq.*, the predecessor to the FWPCA, and defeated a claim of federal preemption of simultaneous state regulation. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), *reh. denied*, 412 U.S. 933 (1973). Nor is state law that prohibits more than federal law necessarily in conflict with, and preempted by, federal law, since the toleration of certain conduct by federal law does not imply an affirmative policy in favor of that conduct. *Connecticut v. Levi Strauss & Co.*, 471 F. Supp. 363, 367 (D. Conn. 1979). The courts have, moreover, been especially reluctant to find

---

[6] In so doing, the Court relied upon the following Congressional expression of federal policy found at 42 U.S.C. § 1857:

> "[I]t is hereby declared to be the policy of Congress to preserve and protect the primary responsibilities and rights of the States and local governments in controlling air pollution. . . ." 362 U.S. at 445-46.

The comparison with the statement of policy in the Federal Water Pollution Control Act is instructive:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution. . . . § 101(b), 33 U.S.C. § 1251(b).

federal preemption of the state police power. There has developed, instead, the doctrine that the exercise of the historic police power of the states is not to be superseded by federal statute unless such was the clear and manifest purpose of Congress. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978). Statutes which invade the common law are similarly strictly construed, and are read with a presumption favoring the retention of long-established and familiar principles. *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). Far from presenting a situation where state action would stand as an obstacle to the accomplishment of federal objectives, such as the Court found dispositive in *Ray*, at 165, the case at bar concerns state action designed to accomplish purposes which are not only permissible under, but are specifically endorsed by, the applicable federal laws.

B. *The Federal Water Pollution Control Act Displays a Clear Congressional Intent to Preempt Neither the State Police Power Nor the Federal Common Law.*

That Congress well knew its ability to preempt state law by the FWPCA, should it so chose, is clear from § 312(f) of the Act,[7] in which Congress specifically chose to do so with regard to marine sanitation devices. The statute, however, plainly declares its intention to preempt neither state nor national interests—neither the *federalist* nor the *federal* source of the common law—by the breadth of its preservation of all rights under any common law:

> Nothing in this section shall restrict *any right* which *any person* (or class of persons) may have under *any statute*

[7] 33 U.S.C. § 1322(f): "[N]o State or political subdivision thereof shall adopt or enforce any statute or regulation of such State or political subdivision with respect to the design, manufacture, or installation or use of any marine sanitation device on any vessel subject to the provisions of this section."

> *or common law* to seek enforcement of any effluent standard or limitation or to seek *any other relief* (including relief against the Administrator or a State agency). § 505(e), 33 U.S.C. § 1365(e) (emphasis supplied).

This provision received little explanation in the legislative history, both bodies being in remarkable agreement.[8] The Senate Report, however, displays the true intent behind the subsection. The Citizens Suit provision, § 505 of the Act, was drawn as a private attorneys general measure in an effort to broaden enforcement of the limitations and standards imposed by the Act. H.Rep. No. 92-911, 92d Cong., 2d Sess., at 134 (March 11, 1972) (hereinafter "H.Rep."), reprinted in "A Legislative History of the Water Pollution Control Act Amendments of 1972," (hereinafter "Legislative History") v.1, 1973, at 753. Consistent with the Act's stated policy encouraging citizen participation as a public service,[9] the citizens suit provision extends enforcement authority by creating a private right of action and adopting the standing test set forth by this Court in *Sierra Club v. Morton,* 405 U.S. 727 (1972). S. Conf. Rep. No. 92-1236, 92d Cong., 2d Sess., at 145-46 (Sept. 28, 1972) (hereinafter "Conf. Rep."), reprinted in Legislative History, v.1, at 281. The section is drawn to permit an individual to bring an enforcement action without having to meet the prerequisites, such as the jurisdictional damage amount, of an extra-statutory private action. If the prerequisites can be met, however, the extra-statutory action remains freely available, including any common law tort action. *See,* S. Rep. No. 92-414, 92d Cong., 1st Sess., at 81 (October 28, 1971) (hereinafter "S. Rep."), reprinted in Legislative History, v.2, at 1415. While the citizens suit provision creates a limited citizens right and remedy where there

---

[8] Both H.R. 11896 and S.2770 contained verbatim the provision enacted as § 505(e).

[9] *See,* § 101(e), 33 U.S.C. § 1251(e).

otherwise may have been none,[10] § 505(e) makes clear that it does not intend thereby to extract in return any citizens' rights or remedies which otherwise are available.

The intent behind § 505(e) is also illumined by the realization that the provision was adopted verbatim from the Clean Air Act Amendments of 1970,[11] and was intended to have the same effect. *N.R.D.C. v. Train*, 510 F. 2d 692, 701 n.46 (D.C. Cir. 1975). It was that Clean Air Act citizens suit section, and presumably its savings provision identical to that of § 505(e), on which this Court relied in *Washington v. General Motors Corp.*, 406 U.S. 109 (1972). In that decision, issued on the same day that this Court affirmed the existence of federal common law rights when dealing with air or water in their ambient or interstate aspects, (*Illinois*, 406 U.S. at 103) and authored by the same member of the Court, it was declared that the states retain broad residual powers despite the federal pollution control scheme, and that citizens and states may bring suit to enforce other statutory and common law rights. 406 U.S. at 115 n.4.[12]

---

[10] There is some authority, however, for the proposition that a private right to enforcement of the statute exists without benefit of the citizens suit provision, in part because pollution of interstate or navigable waters is an area of federal concern as to which an implied private remedy in the federal courts should not be denied. *National Sea Clammers Association v. City of New York*, 616 F. 2d 1222, 1230 (3d Cir. 1980), *petition for cert. filed*, 48 U.S.L.W. 3752 (May 20, 1980), and cases cited; *but see contra, City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F. 2d 1008, 1016 (7th Cir. 1979), *cert. denied*, — U.S. —, 48 U.S.L.W. 3436 (January 8, 1980).

[11] 42 U.S.C. § 1857h-2(e). The identical provision is now codified at 42 U.S.C. § 7604(e).

[12] The juxtaposition of the two decisions cited indicates that federal, as well as state, common law is preserved by § 505(e). Petitioners' contrary argument, at note 9, pages 21-22 of their Brief, based upon the chronology of legislative action, ignores the fact that the drafters of the FWPCA in 1972 were fully cognizant of the significance of the decisions in *Sierra Club v. Morton*, 405 U.S. 727 (1972), which was delivered on April 19, 1972, and *Getty Oil Co. v. Ruckelshaus*, 467 F. 2d 349 (3d Cir. 1972), which was handed down

The broad savings provision of § 505(e) is not the only indication of non-preemptive intent found within the FWPCA. In § 510, entitled "State Authority," Congress specifically sought to preserve the rights of the states to the unfettered exercise of their historic police powers with regard to pollution of interstate or navigable waters, except insofar as such exercise might interfere with the federally mandated minimum controls:

> Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation . . . is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation . . . which is less stringent . . . or (2) be construed as *impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.* 33 U.S.C. § 1370 (emphasis supplied).

Whether a state may choose to exercise its "right or jurisdiction" over its own water quality by means of statutory state-wide standards, or case-by-case protection of the public health, it is clear that Congress intended not to intrude upon that decision, provided that the minimum control levels established by the Act are not contravened. Here again is a provision of the Act upon which there was complete har-

---

on September 12, 1972. Senate Consideration of the Conference Report, October 4, 1972, reprinted in Legislative History, v.1., at 161, 179, 181. The decisions in *Illinois v. Milwaukee* and *Washington v. General Motors Corp.* were issued on April 24, 1972, and the FWPCA was enacted on October 18 of that year.

mony between the two legislative bodies, and the House Committee report underscores the obvious non-preemptive meaning of the broadly phrased language:

> The Committee considers section 510 to be of extreme importance in assuring the States of the right to adopt or enforce provisions at least as strict as those established in this legislation. Thus, the Committee rejected in most instances suggestions for preemption by the Federal Government and preempted the States only where the situation warranted it based upon the urgent need for uniformity such as in section 312(f) relating to marine sanitation devices. H.Rep., *supra* at 136.

Neither did Congress intend the FWPCA to offer the exclusive statement of national policy—the *federal* rationale for the common law applied in the case at bar—in the quality of interstate or navigable waters. In yet another measure of the Act's limited reach, § 511 specifically declines any limitation on the authority or functions of any federal officer or agency under any other law not inconsistent with the Act.[13] That a member of the judicial branch of government is an "officer" of that government is apparent from the statement of the Conference Committee that § 511 "preserves the authority of other Federal laws which are consistent with this Act." Conf. Rep., *supra* at 148. No distinction is made between statutory and judicial law. Not only those Congressional statements of federal policy contained in other legislation touching the navigable waterways (*see, Illinois,* 406 U.S. at 101-02), but also federal law fashioned to accommodate competing statutory policies, are preserved by, insofar as not inconsistent with, the Act.

---

[13] "This Act shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this Act; . . ." § 511(a), 33 U.S.C. § 1371(a).

Moreover, in the present instance the judicial law applied by the federal court will in fact operate to resolve an inconsistency with the Act and to advance the federal purposes, rather than to clash with them. The maintenance of a public nuisance—the finding of fact from which the legal analysis herein must start—is plainly inconsistent with the purposes of the Act as expressed in § 101(a), 33 U.S.C. § 1251(a), as well as with the broad federal environmental purposes set forth in NEPA, 42 U.S.C. § 4321, *et seq.* Abatement of the nuisance will resolve the inconsistency, while permitting the exercise of state authority guaranteed by § 505(e), and without contravention of the minimum control levels prescribed by the Act.

The Federal Water Pollution Control Act is built upon a cooperative federalist scheme which recognizes the primary rights and responsibilities of each state to control pollution within its own domain. That principle is evoked in the policy declaration of § 101(b), *supra* n.6, and echoed throughout the Act. In the carrot-and-stick approach characteristic of various federal/state programs, and particularly those in which the federal interest intrudes upon the traditional state police power, the Act provides for minimum federal water quality standards and effluent limitations,[14] induced compliance by federal guidelines and grants,[15] and insured by joint federal/state/citizen enforcement.[16]

The "uniformity" which was provided in the FWPCA is a uniform *floor* of pollution control, not a uniform *level* of control. By its very use of the phrase "effluent limitations," the Act plainly intends to set only a minimum rate at which the nation will move toward the goal of zero discharge of pollutants, while allowing each state the right to exceed that pace.

---

[14] §§ 301, 303, 306, 307; 33 U.S.C. §§ 1311, 1313, 1316, 1317.
[15] § 304, and Title II; 33 U.S.C. § 1314, and Subchapter II.
[16] §§ 309, 505; 33 U.S.C. §§ 1319, 1365.

See, Statement of Russell Train, Chairman, Council on Environmental Quality, on H.R. 11896; reprinted in Legislative History, *supra* v.2, at 1116.

C. *Where States Have an Express Statutory Right to Set Varying Pollution Control Standards, Only a Federal Common Law Means of Resolving an Unreasonable Interstate Interference with Those Standards Can Prevent the Likelihood of Interstate Industrial Competition at the Expense of Environmental Quality.*

It has also been argued that a uniform level of control, whether or not required by the Act, is necessary to prevent interstate industrial competition, with economic advantages adhering to the state which least aggressively presses costly controls on industry. While a uniform mandatory level of pollution control rather than a minimum level would operate to prevent industrial competition, for a variety of reasons Congress has set only a minimum, and has preserved the states' flexibility beyond that level. It is in fact such a flexible system which, without an equitable means of accommodating its interstate effects, provokes industrial competition. And in view of the flexibility permitted by the FWPCA, it is only the federal common law which can, in a given situation, discover a measure of uniformity among varying standards.

The potential inequities of a system which provides for flexibility without a means of resolving conflicts are most apparent within the fact pattern alleged in *New England Legal Foundation v. Costle.* A New York utility operating under a state-granted and EPA-approved variance consumes 2.8 percent sulfur fuel, thereby saving its consumers an estimated 52 million dollars. The utilities are situated on the north shore of Long Island, and their emissions are predictably carried by prevailing winds into Connecticut, allegedly causing harm to the public health. Connecticut's rate-payers must support the

higher fuel cost of the 0.5 percent sulfur limitation in that state, while not even enjoying the environmental and public health benefits of the low-sulfur limit. Connecticut's industries either suffer the increased fuel cost, to their competitive detriment, or succumb to the competition and relocate to a less stringently controlled area.

Industrial development and its economic benefits are unavoidably purchased at the cost of some environmental impacts. The federalist free enterprise system upon which this country is based demands the freedom of each state to make that value judgment, and the federal air and water pollution statutes have not withdrawn that right from the states except where the minimum standards would be contravened. To the extent that the consequences—economic, environmental or otherwise—of industrial conduct are visited entirely upon an emitting state, that state is legislatively competent to regulate such conduct on behalf of its citizens. But when the externalities of industrial conduct touch a neighboring state, and may in fact affect the way in which the industrial-environmental balance is drawn in that state, the receiving state must suffer the consequences without the opportunity to have exercised its own judgment on the value of that conduct. While the receiving state is legislatively incompetent to weigh the benefits of the conduct, the emitting state is equally incompetent to judge its costs, as they are visited upon the citizens of its neighbor.[17]

In these dense and tangled thickets of intertwining social, economic, and environmental values, implicating such often divergent and vital interests as private property rights, the public health, and the historic police power of the states, are

[17] Nor has the receiving state, by any conduct of its own, subjected itself to the jurisdiction of the emitting state or otherwise conceded the decision-making process to it. The superior authority of the emitter is purely an accident of geography.

made many of the most critical quality-of-life decisions which society faces. Our federalist system leaves the right to make such decisions, except where specifically assumed by the central government, with the states. When the rights of two states so collide, the only jurisdiction competent to resolve the conflict is the federal equity jurisdiction.

III. Subsequent Judicial Interpretations of the Rule of *Illinois* Have Seen Some Variation Which Warrants Clarification by This Court.

The subsequent history of *Illinois* as case precedent has provoked neither a rash of federal common law pollution suits nor a violent clash of interpretations between the Circuits. There has been some disagreement over the scope of the federal interest recognized in *Illinois,* but no aspect of those differences would operate to deny to plaintiffs a federal common law remedy under the facts as proved in the case presently at bar.

The Seventh Circuit has most frequently interpreted the law of *Illinois,* and has enunciated certain principles also reflected by the courts of other jurisdictions. The *federalist* component of the common law rationale was recognized in *Stream Pollution Control Board of Indiana v. U. S. Steel Corp.*, 512 F. 2d 1036 (7th Cir. 1975), in which *Illinois* was interpreted as providing that the federal courts may fashion a federal common law of public nuisance to resolve controversies involving the impairment of the environmental interests of one state by sources outside its domain. *Id.* at 1039, citing *Texas v. Pankey,* 441 F. 2d 236 (10th Cir. 1971). The court there acknowledged, without deciding, the further issue of whether the federal common law extends to all navigable waters without requirement of interstate effect. It was uncertain whether jurisdiction might be supported only by

the federal interest expressed in statute,[18] or whether the national interest in the purity of interstate bodies of water[19] would suffice. *Stream Pollution Control Board,* 512 F. 2d at 1040. Without reaching an answer to the question, the court did, however, note that in several instances the federal government had been permitted to pursue such claims without allegation of a conflict between sovereign state interests. *Id.* n.9, and cases cited; *see also, United States v. Stoeco Homes, Inc.,* 498 F. 2d 597, 611 (3d Cir. 1974), *cert. denied,* 420 U.S. 927 (1975).

In its decision in the case now at bar, *Illinois v. Milwaukee,* 599 F. 2d 151 (7th Cir. 1979), the binding precedent of this Court's 1972 decision precluded any necessity for the Circuit Court to discuss the basis for the availability of the federal common law. But a detailed analysis of the FWPCA concluded, on the basis of the express provisions of the Act itself, including its amendments through 1977 and implementing regulations, that Congress had not intended to preempt or otherwise limit the availability of common law relief. *Id.* at 162-64.[20] And the court strongly intimated that the federal interest so preserved was limited neither to the existence of

---

[18] Circuit Judge Oakes answered this question in *United States v. Ira S. Bushey & Sons, Inc.,* 346 F. Supp. 145, 149 (D. Vt. 1972), and 363 F. Supp. 110, 120 (D. Vt. 1973), when he held that the numerous federal laws for the control of pollution of interstate or navigable waters do not establish the exclusive means of protecting the federal interest in the quality of those waters.

[19] Judge Oakes termed this the "public interest in preserving the environmental integrity of Lake Champlain, the sixth largest lake in the country and a jewel of nature." *U.S. v. Bushey,* 363 F. Supp. at 119.

[20] *Accord, City of Evansville, supra* n.10, at 604 F. 2d 1014; *National Sea Clammers Association, supra* n.10, at 616 F. 2d 1226-28, 1233 n.31; *California Tahoe Regional Planning Agency v. Jennings,* 594 F. 2d 181, 193 (9th Cir. 1979); *Township of Long Beach v. City of New York,* 445 F. Supp. 1203, 1215 (D. N.J. 1978).

interstate effects, nor to the presence of a state as a complainant.

> We can think of no other reason for Congress' preserving previously existing rights and remedies than to protect the interests of those who would be able to show that the requirements imposed pursuant to the federal statute are inadequate to protect their interests. When the complaining party is a neighboring state, the federal common law of nuisance provides a peculiarly appropriate remedy. *Id.* at 165.

In *City of Evansville, supra,* n.10, the Seventh Circuit held that when a state's interests are implicated, the state itself need not be a party to an action brought under the federal common law by a municipality.[21] The Court again expressly declined to answer whether a private party may bring such a claim, or whether a claim may be made in the absence of interstate effect. 604 F. 2d at 1018.

What thematic variations do exist between the courts primarily involve the application of the federal common law in the absence of allegations of interstate effects. Where no interstate effect is alleged, some courts have found no federal interest to be present, and suit under the federal common law has not been allowed. *Committee for Jones Falls Sewage System, supra* n.21, at 539 F. 2d 1009; *Parsell v. Shell Oil Company,* 421 F. Supp. 1275, 1281 (D. Conn. 1976), *aff'd sub nom. East End Yacht Club v. Shell Oil Co.,* 573 F. 2d 1289 (2d Cir. 1977); *Reserve Mining Co. v. Environmental Protection*

---

[21] *Accord, Township of Long Beach,* 445 F. Supp. at 1214. That the state, or *federalist,* interests might be sufficiently implicated by a non-municipal private party was confirmed in *Committee for the Consideration of the Jones Falls Sewage System v. Train,* 539 F. 2d 1006, 1009 n.8 (4th Cir. 1976), citing *Hinderlider v. La Plata.* The Third Circuit has also found a private party competent to assert the *federal* interest in interstate or navigable waters. *National Sea Clammers Association,* 616 F. 2d at 1233.

Agency, 514 F. 2d 492, 520 (8th Cir. 1975). *See also, Commonwealth of Massachusetts v. United States Veterans Administration,* 541 F. 2d 119, 123 (1st Cir. 1976). Such an analysis relies exclusively upon the *federalist* justification for the common law, and ignores the *federal* interest in the purity of all interstate and navigable waters, an interest manifested in the FWPCA, NEPA and other federal statutes, and held by Mr. Justice Douglas to provoke the applicability of the federal common law. *Illinois,* 406 U.S. at 104.

Recognition of this aspect of the *Illinois* decision was provided in *Illinois v. Outboard Marine Corporation,* — F. 2d —, 14 E.R.C. 1281 (7th Cir. 1980), in which a state was permitted to bring suit under the federal common law for nuisance caused by the pollution of interstate or navigable waters, but without allegation of interstate effects. In so doing, the Court of Appeals provided the clearest recognition yet of the *federal* aspect of the federal interest in such disputes, and the compatibility of that interest with the federal statutory scheme.

> The nation has a basic overriding federal interest in interstate and navigable waters and in developing a uniform program of protecting these national resources from pollution. The Federal Water Pollution Control Act made this interest explicit. The federal common law of nuisance fills the interstices in the Act. *Id.* at 1283.

It is that uniformity of standard in the control of pollution of interstate waters which the Third Circuit found to be justification for the application of federal common law to protect the *federal* interest even when asserted in a suit by private parties. *National Sea Clammers Association,* 616 F.

2d at 1233.[22] One purpose of the FWPCA is to protect individuals from injury related to the pollution of interstate waters, and where that federal purpose is involved even private parties may exercise the common right. *Id.* at 1229, 1234-35.

The question has also been raised whether compliance with the relevant federal statute can constitute a defense to or otherwise limit the relief available under the federal common law of nuisance. In the analogous situation presented in *New England Legal Foundation v. Costle,* the District Court dismissed the federal common law cause of action for interstate pollution for failure to state a claim. There, plaintiffs were municipalities and private parties, and the allegations of interstate effects were plainly pleaded. But the court declined to hear the matter on its merits, holding that in no event would it create an equitable remedy to proscribe conduct approved by the applicable statute, there the federal Clean Air Act. 475 F. Supp. at 441. It is that portion of the case upon which the Second Circuit has reserved judgment pending the decision of this Court in the instant case, and which is relied upon by Petitioners herein as support for the proposition that the federal common law is not available where conduct is approved by a federal statute or administrative agency. Brief for Petitioners at 38-39, 42 n.20.

The District Court in *New England Legal Foundation,* however, incorrectly relied upon *Jones Falls Sewage,* where the Fourth Circuit declined to restrict statutorily approved conduct specifically because of the absence of interstate ef-

[22] *Accord, Byram River v. Village of Port Chester,* 7 E.R.C. 1127, 1128 (D. Conn. 1974), 394 F. Supp. 618, 622 (S.D. N.Y. 1975); *see also, Michie v. Great Lakes Steel Division,* 495 F. 2d 213, 216 n.2 (6th Cir. 1974), *cert. denied,* 419 U.S. 997 (1974), suggesting that federal common law may be available to private parties where interstate effects are alleged, although to that point only states had pursued such actions.

fects. The Court of Appeals there recognized the *federalist* interest inherent in *interstate* pollution disputes, 539 F. 2d at 1009, but held that the only *federal* interest implicated in an *intrastate* controversy was expressed in and fully circumscribed by the federal statute.

> *To the extent there is a federal interest, it is expressed in the Federal Water Pollution Control Act Amendments of 1972,* but the plaintiffs have no claim based upon the statute. . . .
>
> While the state courts are free to apply state nuisance law more rigidly, a federal court *in such a local controversy* may not turn to a supposed body of federal common law to impose stricter standards than the statute provides. 539 F. 2d at 1009 (footnote omitted; emphasis added).

The court's interpretation of § 505(e) of the Act as preserving only state common law claims appears misplaced. (See argument at Section II B, *supra.*) In any event, the proper reading of the Fourth Circuit's decision would recognize statutory limits only in the absence of allegations of interstate effect.

The better rule would seem to be that applied by the Seventh Circuit in the *Outboard Marine Corp.* case:

> We conclude, based on *Illinois v. Milwaukee* and the Federal Water Pollution Control Act, that there is an overriding federal interest in preserving, free of pollution, our interstate and navigable waters. When a pollution controversy arises, it is immaterial whether there is a showing of extraterritorial pollution effects. The issue is whether the dispute is a matter of federal concern. When it is, as in this case, federal courts should be accessible. The effect of the federal common law of nuisance is to fill the statutory interstices and to provide uniformity in controlling water pollution in either interstate or navigable waters of the United States. 14 E.R.C. at 1287.

Conclusion.

The exercise, or non-exercise, of control over air and water emissions implicates a host of values—land use and planning, municipal finance, industrial development, protection of the public health, and the preservation of ecological rights—traditionally within the ambit of state and local government. When the determination of those values by one state may conflict with that of another, the maintenance of the federal relationship requires that the federal judiciary fashion an equitable resolution from the federal common law. And as environmental protection has itself recently come to be recognized as an interest within the delegated grant of powers to the central government, it has created an independent source of federal equity jurisdiction to effectuate the policies found in various federal environmental legislation, including the Federal Water Pollution Control Act.

The case at bar inspires both sources of federal jurisdiction, by its simultaneous provocation of matters of federal relationship and of federal concern. The Federal Water Pollution Control Act represents a plainly and purposely limited expression of federal policy intended to supplement, rather than to subvert, both the state and federal interests which here justify the application of the federal common law. The decision of the Court below should be affirmed.

Respectfully submitted,

WILLIAM W. BECKER,
LANDFIELD, BECKER & GREEN,
Suite 1050,
1819 H Street, N.W.,
Washington, D.C. 20006.
(202) 293-1919

WAYNE S. HENDERSON,
ROBERT R. RUDDOCK,
NEW ENGLAND LEGAL FOUNDATION,
110 Tremont Street,
Boston, Massachusetts 02108.
(617) 482-1410

Dated September 2, 1980.